

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/04/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL APPEAL NO.317 of 2001

Leon Bernard .. Appellant

-Vs-

Central rep. by
The Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit,
Chennai-90. .. Respondent

Criminal Appeal preffed u/s 374 of Cr.P.C. as stated therein.

For Appellant: Mr.R.C.Paul Kanagaraj

For Respondent:Mr.Jeyachandran
for Mr.P.N.Prakash
Special Public Prosecutor.

:JUDGMENT

This Criminal Appeal is directed against the judgment dated 16.2.2001 rendered in C.C.No.255 of 1998 by the Court of Additional Special Judge for NDPS Act Cases, Chennai thereby convicting the appellant for an offence punishable under Sections 8(c) read with 21 of the NDPS Act and sentencing him to undergo R.I. for ten years and to pay a fine of Rs.One lakh in default to undergo a further R.I.for a period of six months.

2. The charge against the appellant/accused before the trial Court was that on 7.10.1998, the officers of Narcotic Control Bureau, Chennai, intercepted the accused, on a specific information, at Chennai Central Railway Station and on enquiry the accused handed over the Heroin weighing about 820 grams in two "Sunrise premium packets" inside a polythene cover which was kept in a blue colour rexine bag and this contraband, the appellant/accused was in possession of for the purpose of transporting the same from Chennai to Trivandrum with intent to export the same to Colombo and hence the charge for the commission of offence punishable under sections 8(c) read with 21 of NDPS Act.

3. The trial Court, based on the said charge, has conducted the trial of the case with such opportunity afforded to the appellant/ accused during

which, the prosecution, which is burdened with proof of the case registered with such standard of proof beyond all reasonable doubts, has examined 6 witnesses for oral evidence as P.Ws. 1 to 6 besides marking 33 documents as Exs. P1 to P33 for documentary evidence and further marking 12 material objects as M.Os. 1 to 12.

4. The trial Court then having framed proper point for consideration of the case of the prosecution in the light of aforementioned evidence and appreciating the same in its own way has ultimately arrived at the conclusion holding the appellant/accused guilty of the said offence charged and would pass the sentence extracted supra.

5. It is only challenging the said conviction and sentence, the appellant/accused has come forward to prefer the above appeal on grounds such as (i) that the learned judge failed to consider the noncompliance of Sections 42(1), 42(2) and 50(1) of NDPS Act; (ii) that the learned Judge failed to note that Ex.P1 is not the actual information recorded in the unit, but the informant appeared before him and gave a written information as per the evidence of P.W.1 and the same has not been placed before the Court and Ex.P.1 is nothing but a copy of the extract from the original and it would go to show that the same had been submitted to the Assistant Director by PW1 in compliance of Section 42(2) of NDPS Act; (iii) that the learned Judge failed to note that the seizure was effected between sunset and sunrise (if) that regarding compliance of Section 50(1) of the Act, contradictory evidence has been given by witnesses which the learned Judge has failed to note; (iv) that the learned Judge has further failed to note that the accused was not informed of his valuable right guaranteed under Section 50(3) of NDPS Act; (v) that the learned Judge has failed to note the contradictions in between the evidences of P.Ws. 1,3 and 6; (vi) that the vitral contradiction with regard to the quantum of contraband seized has also been not noted by the trial court; that according to P.W.1, the total quantity was each 400 grams in two packets, but according to P.W.3 each 400 grams in two packets, but the same according to P.W.6, the first packet containing 600 grams and the second packet containing 200 or 300 grams; that according to mahazar, the first packet contained 418 grams and the second packet contained 394.6 grams totally weighing 812 grams whereas uniformly all the three witnesses would say that the seized contraband was weighing 800 grams only; (vii) that the learned Judge failed to appreciate that while the accused was travelling in an auto-rickshaw, the same was intercepted by the Officers at Valluvarkottam along with his friend and they both were detained at the office and later releasing his friend, the case was foisted against him and this factor is corroborated by P.W.6 and therefore the leaned Judge should have arrived at the conclusion to hold that the prosecution has failed to prove its case beyond reasonable doubt and should have acquitted the appellant.

6. During arguments, the learned counsel appearing on behalf of the appellant, besides giving a picture of the judgment delivered by the lower Court and the sentence passed and further mentioning the number of witnesses examined, documents and M.Os. marked, would further say that the case of the prosecution is that on 7.10.1998, P.W.1 the Intelligence Officer of the N.C.B. received the information at 4.30 p.m. that day in writing through a letter,

that the person staying in a lodge at Mannadi was in possession of 800 grams of Heroine, describing the identity of the accused and that the contraband was concealed in 'Sunrise Premium' packets and that person was likely to leave for Trivandrum and recording this information, a copy was taken out by P.W.1 and handed over to the Assistant Director, Narcotics Control Bureau; that P.W.1 along with P.W.3 and two Intelligence Officers and accompanied by the informant and police personnel to Madras Central Railway Station and at 5.45 p.m. they procured an independent witness one Rajan who identified the accused kept a dark blue Rexine bag; that P.W.1 intercepted him and the accused took out two packets each containing 800 grams of Heroin and handed over to P.W.1 stating that those packets contained Heroin weighing 400 grams; that the first packet weighs 418.2 grams and the second packet weighs 394.6 grams; that the samples taken from each packet was tested and found to be Heroin; that P.W.1 prepared the seizure mahazar and P.W.3 another Intelligence Officer issued summons to the accused to appear before the respondent; that the accused was also taken to the Office of the Narcotics Control Bureau and on the next day the accused is alleged to have given a voluntary confession and after recording the same P.W.3 arrested and remanded the accused for judicial custody.

7. The learned counsel would continue to argue to the effect that the prosecution out of 6 witnesses have made P.Ws. 1,3 and 6 to speak about the occurrence; that P.W.1 is the seizure Officer, P.W.3 is the accompanied Officer and P.W.6 is the independent witness; that the mahazar witness is said to have gone by 8.30 p.m. whereas to the said time the mahazar could not have been prepared in the manner alleged by the prosecution; that P.W.6 would depose to the effect that the accused is a native of Kerala but is residing at Adayar; that what quantity was seized under the mahazar is the vital evidence. At this juncture, the learned counsel would cite a judgment reported in 2000 SCC (Crl.) 496 (Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat) for the proposition that if information is not reduced into writing, the prosecution cannot initiate the proceeding but adverse inference could be drawn. In the above judgment the Hon'ble Apex Court has held:

"In view of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985, if the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he should forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

Citing the above judgment the learned counsel would point out that the substance of information should be placed before the Court; that Section 42 would apply also for enclosed place and Section 43 to public places and would cite another judgment of the Hon'ble Apex Court reported in 2000 SCC (Crl.) 829 (Koluttumottil Razak Vs. State of Kerala). In the above judgment the Hon'ble Apex Court has held:

"Non-compliance with the requirements of Section 42(1) and (2) would render

the resultant search and seizure suspect, though that by itself may not vitiate the proceedings.”

8. For the compliance of Section 50 of the NDPS Act citing the evidence of P.Ws. 1, 2 and 3 the learned counsel would cite yet another judgment of the Hon’ble Apex Court reported in 2000 SCC (CrL.) 216 (T. Hamza Vs. State of Kerala) In the above judgment it is held:

“Section 50 provides a reasonable safeguard to the accused before a search of his person is made by an officer authorised under Section 42 to make it. The provision is also intended to avoid criticism of arbitrary and high-handed action against authorised officers. The legislature in its wisdom considered it necessary to provide such a statutory safeguard to lend credibility to the procedure keeping in view the severe punishment prescribed in the statute.”

“The question that falls for determination is whether on the facts and in the circumstances of the case as revealed from the evidence on record the search of the person of the accused and the recovery of the packets of brown sugar from the possession was vitiated on account of non-compliance with the requirements of Section 50 of the NDPS Act. From the discussions in the impugned judgment it appears that the contention did not find favour with the courts.”

.... Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.”

.... A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial would render the trial unfair.”

On such arguments the learned counsel for the appellant would pray to allow the appeal setting aside the conviction and sentence passed by the lower court.

9. In reply the learned Government Advocate on the Criminal side would submit that the accused is a Srilankan National; that on reliable information he was intercepted at Central Railway Station and immediately after being accosted he volunteer to hand over two packets of Sunrise Premium both containing 800 grams of Heroine; that he has given a confession statement admitting the offence under Ex.P9 which is admissible in evidence and this confession statement was not at all retracted; that even during the questioning under Section 313 of Cr.P. C. he has not specifically denied the confession statement. The learned Government Advocate at this juncture would cite a judgment reported in (1997)3 SCC 721 (K.I.Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin) wherein the Hon’ble Apex Court has held:

“A confessional statement recorded by reason of satisfactory compulsion or given voluntarily by the accused pursuant to his appearing against summons or on surrender cannot be said to have been obtained by threat, inducement or promise and hence is admissible in evidence for prosecution under Section 135

of the Customs Act or other relevant statutes. Such a confessional statement although subsequently retracted, if on facts found voluntary and truthful, can form the exclusive basis for conviction and it is not necessary that each detail in the retracted confession be corroborated by independent evidence. It is however, a rule of prudence and practice that the Court seeks assurance from other facts and circumstances to corroborate the retracted confession.”

10. So far as the information is concerned the learned Government Advocate would point out that the information passed on has been recorded in Ex.P1. Citing from P.W.1’s deposition regarding the confession statement the learned counsel would cite yet another judgment of the Hon’ble Apex Court reported in 2002 (7) Supreme 122 (Narayanaswamy Ravishankar Vs. Asst. Director, Directorate of Revenue Intelligence) wherein it is held:
“ As search and seizure of narcotic drug was not conducted on person of the accused Section 50 of NDPS Act was not attracted and as search and seizure was done at the airport, a public place, Section 42 of the Act was not attracted.”

On such arguments the learned Government Advocate would ultimately pray to dismiss the above Criminal Appeal confirming the conviction and sentence as passed by the trial Court.

11. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, no doubt, it is a case registered under Sections 8(c) and 21 of the NDPS Act for the commission of the offence perpetrated on the part of the sole accused, the appellant herein for being in possession of Heroin weighing 800 grams contained in two Sunrise Premium packets each containing 400 grams and the officials of the Central Narcotic Control Bureau accompanied by the informant and independent witness proceeded to the Central Railway Station, Chennai, and on being identified by the informant, they accosted the accused and having been caught hold of and during interrogation the accused volunteered to take out from a blue rexin bag that he was keeping with him, two Sunrise premium packets and handed over the same with the officials and on inspection of the said packets it came to be known that the packets contained Heroine weighing 800 grams and the accused would also give a voluntary confession in which he would reveal that the said Heroin was meant for being transported to Trivandram so as to be sent to Srilanka and the officials particularly P.Ws.1 and 3 who were respectively at the relevant point of time working as the Intelligence Officer, Central Narcotic Control Bureau, among whom P.W.1 would examine the accused with whom the accused would give a voluntary confession stating that he was staying in Fousia Lodge at Mannadi and is ready to entrain to Trivandram and would hand over the contraband mentioned supra weighing 800 grams of Heroin stating that he got them from one Manoj; that on being tested on the spot P.Ws.1 and 3 being satisfied that they were Heroin, P.W.1 took samples from each packet weighing 5 grams and would send the same for chemical analysis. He would also seize the other materials kept with him which that they would recover i.e. the lock and key, the Indian Currency and Srilankan Currency all under the cover of mahazar which would be marked as Ex.P2 attested by P.W.1 and the accused and affixing the official seal on the contraband seized i.e. M.Os. 1 to 10 and summoning P.W.3 also, P.W.1 would complete the other legal formalities of causing the arrest of the accused

remanding him to judicial custody and would also submit the seized articles to the Special Court requesting the Court for referring the samples for chemical analysis and to obtain the report from the analyst; that the requisition and the M.Os. would be ordered to be kept in safe custody by the police themselves and would refer the samples with the test memo. to the chemical analysis centre along with Ex.P3 letter and the test memo. which would be marked as Ex.P4; that on completion of the chemical analysis, Ex.P5 report would be sent from the Chemical Analysis Centre; that P.W.1 would also send a special report in Ex.P6 to his superior.

12. P.W.2 the chemical analysis would also depose to the effect that she received the samples on 14.10.1998 through the Intelligence Officer attached to the Narcotics Control Bureau viz., Rajasekaran along with the Court letter and the samples; that under the supervision of this witness one T.V.Radhakrishnan analysed the sample and submitted the report. Through this witness not only Ex.P3 letter by the Court, but also Ex.P4 test memo. and Ex.P5 report would be marked. This witness would clearly give the report to the effect that the sample was Di-Acetyl Morphine @ Heroin.

13. P.W.3 is also the Intelligence Officer attached to the Central Narcotics Control Bureau, who identifying the accused would adduce evidence to the effect that on 7.5.1998 his Assistant Director sent for him and got him introduced to P.W.1 stating that he has got reliable information of transportation of Narcotics substances at Central Railway Station and wanted him to initiate measures in accordance with law; that securing two independent witnesses and taking position at Waltax Road in between 6.15 and 6.30 a.m. the accused came there who was identified by the informant and the witnesses introducing themselves to the accused they expressed the desire to examine him under the NDPS Act and the accused having revealed himself P.Ws. 1 and 3 informed him of his right to be searched either in the presence of a Gazetted Officer or a Magistrate in compliance of Section 50 of the NDPS Act, but the accused was not amicable for that and volunteered to be searched by P.Ws. further the accused opened the rexin bag and handed over the contraband and all other acts done as deposed in the evidence of P.W.1. This witness would also depose very much in the same style and language without any major contradiction.

14. P.W.4, yet another Officer of the Central Narcotics Control Bureau who was authorised to examine the witnesses and record their statement would submit that on 9.12.1998 he had submitted a report in Ex.P.20; that the accused was in possession of a ticket to travel on 7.10.1998 from Chennai to Trivandrum; that he had reserved the said ticket in advance; that on perusal of the requisition he noted the name of the accused as Leo Joseph; that the accused offered the address as No.18, Mannar Mudali Street, Vadapalani, Chennai-93; that he sent for the owner of the building one Perumal and examined him on 22.12.1998 and he confirmed there that from 1996 one Leo Joseph was a tenant in his building and in the same year in August he vacated the place and his statement would be signed by this witness and the said Perumal and marked as Ex. P23; that the said Perumal identified the said accused by photograph Ex.P.24 and would further depose that the accused had also booked the flight ticket in Air Lanka and the same would be marked as

Ex.P.30; that the ticket had been obtained in the name of one L.Bernard; that he submitted his report to the superior in this regard in Ex.P25; that he sent for the recovery mahazar witnesses and the summons would be marked as Ex.P.26; that he examined the witnesses on 28.12.1998 and the statement given in writing by the mahazar witness Jayakrishnan which would be marked as Ex.P27; that the manager of the lodge in which the accused was staying at Madras was also required to appear before him as Ex.P28 and the written statement given by the said person would be marked as Ex.P.29; that this witness would also identify the accused in the photograph, which would be marked as Ex.P30; that himself and Ilangovan signed Exs.P.28 and P.29; that he submitted all those documents in the Court along with the complaint.

15. P.W.5 is one Ilangovan who is the manager of the Fousia Lodge wherein the accused was staying and would depose that he was working in the said capacity for four years; that the accused stayed in the lodge in the name of Leo Joseph, further stating that he belonged to Madurai; that in between July and October, 1998 the accused used to come and stay in the lodge but he could not exactly say on which dates he stayed there; that he would identify his signature in Ex.P28; that two months after the staying of the accused, he was examined by the officers; that the first statement would be marked as Ex.P29 and the photograph of the accused from which this witness identified him would be marked as Ex.P30.

16. P.W.6 would depose that on 7.12.1998 to see a person he went to the Madras Central Railway Station when he was requested to be a witness in the detection of a crime along with another Ranjan, an auto driver they both agreed; that around 6.15 that evening an Officer identified a person and he was nabbed by them and the officers besides getting themselves introduced to him, they also revealed the purpose for which they came and this witness would further narrate the other happenings regarding the accused entrusting the contraband weighing 800 grams contained in two Sunrise premium packets; that on further inspection of the bag they found Indian Currency, Srilankan Currency, the Railway ticket for Trivandram and then the Officers weighed the contraband which according to the witness was 600 grams and another 200 or 300 grams; that they took samples and sealed the same and prepared mahazar to the happenings in which the witness would sign and the same would be marked as Ex.P2; that the blue colour zipper bag would be marked as M.O.9; that the witness would also sign M.Os.1 and 2 containing the brown sugar; that the sample would be then put inside the sealed covers which would be marked as M.Os.3 to 6; that the currency notes would be marked as M.O.10 and the Railway ticket and the cover in which it was kept is M.O.7; that in all these the witness would sign; that the sealed cover would be marked as M.O.8; that this witness would sign all the M.Os.1 to 10.

17. All the witnesses would be cross-examined on the part of the learned counsel appearing on behalf of the accused and in fact the defence was not able to make its mark in the cross-examination either making only dent into the central frame of the prosecution case depicted through the witnesses and the documents and the M.Os. nor had there been any major gain for the defence which is noteworthy. The contradictions marked are also very minor and not conspicuous so as to say that the prosecution case is weakened by any violent or jumping contradictions and therefore it could be safely concluded that neither the basic structure of the prosecution case put up in the manner

aforementioned nor the manner in which they have been either performed or brought into evidence the defence was able to score any point and hence it could be concluded that neither is there any statutory violation nor procedural flaw in the observance of the mandatory provisions of law such as Sections 42, 50, 57 etc., of the NDPS Act nor is this Court able to find any of the procedural failure so as to brand violation of the principles of natural justice or lack of opportunity. The uniform case put up by the prosecution has been brought to fore by positive, reliable and acceptable evidence and there is no strong reason for the lower Court to have not adopted any other course in order to arrive at a different conclusion than to the one that has been arrived at to hold that the prosecution has proved its case to the standard of proof required by law that is beyond all reasonable doubts thereby convicting and sentencing the accused in the manner aforementioned.

18. This Court is in perfect agreement that not only the conclusions arrived at by the trial Court but also the manner in which such conclusions have been arrived at and therefore within the meaning of the propositions of law brought-forth through the judgments cited by the prosecution and the defence as well the only conclusion that could be arrived at by this Court is to concur with the conclusions of the trial Court and not to cause any interference into the well considered and merited judgment of the trial Court in arriving at the conclusion to hold that the prosecution has succeeded in bringing home the guilt of the accused.

19. The accused is a Srilankan National and he has also been in the habit of operating in different names in order to conceal his identity since he was indulging in criminal activities such as meddling with the Narcotics cases which is prohibited by law. Ample evidence has been placed on record not only in proof of the accused being in possession of Heroin weighing 800 grams kept in two packets and concealed in the blue zipper bag and that proper evidence by the independent witnesses would corroborate the version of the prosecution in the witness box thus bringing home the guilt of the accused absolutely no strong evidence or circumstances were brought-forth during the trial by the defence attributing any strong motives for the P.Ws. 1,3 and 6 who are the vital witnesses in the proof of the prosecution case nor any other relevant material has been brought on record in proof of the innocence of the accused and all the evidence would only point towards the guilt of the accused without the least doubt being entertained and therefore, not only from the oral evidence adduced one by one but also from the documents and material objects and on a overall consideration of the totality of the circumstances, it comes to be known that the prosecution has proved its case against the accused beyond all reasonable doubts and the trial Court in appreciation of the said evidence has arrived at the right conclusion to hand down the convicting judgment thereby convicting and sentencing the accused in the manner extracted supra. Hence the interference of this appellate Court sought to be made into the well considered and merited judgment of the Court of Additional Special Judge for NDPS Act, Chennai is not only unnecessary but unwarranted as well.

In result,

- (i) the above criminal appeal fails and the same is dismissed.
- (ii) The conviction and sentence passed by the Court of Additional Special Judge for NDPS Act, Chennai as per its judgment dated 16.2.20 01 made in C.C.No.255 of 1998 is confirmed.

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To

1. The Additional Special Judge for NDPS Act, Chennai.
2. The Public Prosecutor, High Court, Chennai.

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